IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 418

RAYMOND R. SMITH, AS RECEIVER OF NORTHERN INDIANA RAILWAY, INC., NORTHERN INDIANA RAILWAY, INC., AND GIRARD TRUST COMPANY, AS TRUSTEE,
Petitioners,

against

ABBOTT LAWRENCE MILLS,
Respondent.

PETITIONERS' REPLY BRIEF.

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TABLE OF CASES CITED.

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The brief submitted by the respondent to the petition for a writ of certiorari confesses and emphasizes the petitioners' contention that important questions of law are presented which should be settled by this Court. The respondent's argument is concerned not with the importance of the questions, but with contending that the proper determination of those questions would result in the affirmance of the judgment.

Respondent attempts to secure a denial of the petition and a sustaining of the judgment in his favor by attempting to inject into the case matters entirely dehors the record. On page 21 of his Brief, and by an appendix he attempts to inject into the record an affidavit made September 26, 1940 (nine days after the petition was filed in this Court), made by the Clerk of the St. Joseph Circuit Court that the Plan of Reorganization submitted by the

Bondholders' Protective Committee in the reorganization of Northern Indiana Railway, Inc. stated that if an appeal is taken to the Circuit Court of Appeals "and further if the plaintiff's alleged lien is sustained, it will be paid in cash under the provisions of Article III", and from this he argues on page 2 of his Brief that the "Priority Question is Moot".

It is perhaps true that a motion should be filed to strike this extraneous matter, but we refrain from so doing with the confidence gathered from the opinion of this Court in *Schley* v. *Pullman Palace Car Co.*, 120 U. S. 575, in which this Court said in reference to similar conduct by a party:

> "Much less does it palliate his attempt to influence the decision here, by reference to matters not in the record, and which he must have known could not be taken into consideration. It is only necessary to say that the facts dehors the record, which have been improperly introduced into the brief of the counsel for the defendant in error, have not in any degree influenced our determination of the case."

But if said matter were a part of the record, it would be unimportant and without influence for the obvious reasons (a) that it does not appear who filed the Plan of Reorganization or that petitioners are bound thereby; and (b) an agreement to discharge a lien "if the plaintiff's alleged lien is sustained" does not mean a void or erroneous determination to that effect; it does not preclude a review of an erroneous judgment.

No question presented by the petition has become moot; and it is of the utmost importance that the questions presented shall be reviewed by this Court; that importance is emphasized by the two judgments in this cause by the Circuit Court of Appeals, the first affirming, and the second reversing the judgment of the District Court; both of which judgments were entered upon identically the same opinion.

Point I.

Respondent incorrectly states that petitioners take two positions (1) that the situation is controlled by the federal laws, and (2) that it is one of local law. Instead petitioners present, as they have the right to do under Rule 38, Clause 4(b) of the rules of this Court, first, that the Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter, and second, that it has decided an important question of local law in a way probably in conflict with applicable local decisions.

Respondent says (page 3) "we will not discuss the question whether the Circuit Court of Appeals followed the local or federal decisions as in either event the Circuit Court of Appeals was right". He wholly misconceives the purpose and function of certiorari; jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing, but instead it was given, first, to secure uniformity of decision in the circuit courts, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court.

Magnum Import Co. v. *Coty*, 262 U. S. 159.

Point I.

Point I in the Petition states a conflict of decisions between different Circuit Courts of Appeals. Therefore the many cases decided by state tribunals cited by respondent have no relationship whatever to the Point.

In *Shepherd* v. *St. Louis Public Service Co.*, 64 Fed. (2) 612, the Eighth Circuit decided that "the judgment in the state court is a nullity because rendered only against the receiver and after he had been fully discharged". The Court expressly held that the Missouri statute against abatement was of no avail to the plaintiff; that it did not save plaintiff's judgment from the application of the com-

mon law rule that judgments rendered against a receiver after his complete discharge are void.

Respondent says (page 3) that there would be a conflict if the Missouri statute were similar to the Indiana statute. Excepting that the Missouri statute has an indemnification clause which the Indiana statute does not have, the two are most similar in their terms as to transfer of interest and are identical in their meaning: We quote them:

MISSOURI (Sec. 904 Mo. St.)	INDIANA (2-227 Ind. St.)
"When an interest is transferred in any action now pending, or hereafter to be brought, other than that occasioned by death, marriage or other disability of a party, the action shall be continued in the name of the original party if the party to whom the transfer is made will indemnify the party in whose name the suit is to be continued against all costs and damages that may be occasioned thereby, or the court may allow the person to whom the transfer is made to be substituted in the action; and in all such cases the party to whom the transfer is made shall be required by the court, upon application of the party who made the transfer, either to give such indemnity or to cause himself to be substituted in the action, and upon his omission to do so the court shall order the suit to be dismissed."	"No action shall abate by the death or disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or disability of a party, the court on motion or supplemental complaint, at any time within one (1) year, or on supplemental complaint afterward, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party; or the court may allow the person to whom the transfer is made to be substituted in the action."

At common law the rule was that a transfer of plaintiff's interest *pendente lite* abated the action; and statutes, such as the two above quoted were enacted to abrogate that rule so that substitution of the transferee as plaintiff is permitted, or the action shall be continued in the name of the original plaintiff. There are no cases in Indiana hold-

ing that this statute permits the continuance of the action against a defendant, from whom pending the action, there is a transfer or devolution of liability which is the subject of the action.

In construing this statute the respondent refers to the New York case of *Baer* v. *McCullough,* 176 N. Y. 97, 68 N. E. 129. That case can have no persuasive influence in construing an Indiana statute, and obviously the statute is very different than the Indiana statute, in that the New York statute not only covers a transfer of interest, but a "devolution of liability" pending the action; by its express terms it included a devolution of liability from a defendant to another.

Respondent's only attempt to distinguish the other Federal cases is upon the point that they show that the action was brought after the receiver was discharged. This is a fact which does not create the distinction contended for. As stated by this Court in *McNulta* v. *Lochridge,* 141 U. S. 327, "actions against a receiver are in law actions against the receivership or funds in the hands of the receiver". If there is no receivership or funds there can be no valid judgment irrespective of when the action is brought.

And neither has respondent made a valid distinction as to the case of *Reynolds* v. *Stockton,* 140 U. S. 254; the statement of this Court in that case disposes of the contention of respondent that where the discharged receiver fails to plead specially his discharge, the judgment is not void, but is valid. It was there said if the representative power is gone, it is immaterial whether the court which rendered the judgment knows of it or not. This plain statement of the law was not made dependent upon, nor was it influenced by, the fact that the action was ancillary, nor by any question of authority of counsel, as respondent argues.

Respondent states that petitioners have cited no case from the Seventh Circuit adverse to the opinion in the

present case (p. 5). In *Gray* v. *Grand Trunk Western Ry. Co.*, 156 Fed. 736, 743, that court in its opinion said:

> "With the termination of the receivership and transfer of property and funds, as disclosed in the declaration, the suit at law was not maintainable against the receivers."

In the present case there was a complete transfer of all property and funds by an open and public record on February 11, 1930 (R. 110), almost eleven months before respondent took his judgment; and the receiver was discharged by an open and public record almost two months before the judgment was rendered. The judgment was void no matter when the action was brought.

The decree expressly gave the purchaser at the receiver's sale the right to be made a party (R. p. 104(i)). This was a provision which went to the very consideration of the purchase, and respondent's contention (p. 5) that the purchaser became bound to pay a negligence claim without being made a party is contrary to the plain terms of the order of sale.

Point II.

Respondent says that the decision of the Circuit Court of Appeals is not in conflict with the rules of law stated by this Court in *McNulta* v. *Lochridge*, 141 U. S. 327.

The rule in that case states that so long as the property of a corporation remains in the custody of a court and is being administered by it through a receiver, such receivership is continuous until the court relinquishes its hold upon the property, that actions against the receiver are actions against the receivership, and judgment against him in his official capacity can be paid only from funds in his hands.

Respondent does not attempt to show how his judgment can be valid under the facts that his judgment was ob-

tained ten months after the District Court had "relinquished its hold upon the property" by an unconditional discharge of the receiver, and the purchaser was not made a party.

He says that the decree of the District Court reserved jurisdiction of the matter, and cites *Julian* v. *Central Trust Co.*, 193 U. S. 93 and other cases, which had very definite clauses in the decrees reserving jurisdiction. But the Circuit Court of Appeals in this case expressly decided that there was no reservation of jurisdiction in the decree (R. 151).

Point III.

Respondent at the top of page 18 of his Brief admits that the decision of the Circuit Court of Appeals "is a decision of an important question of local law". But he contends that the same is not in conflict with local law.

The respondent has not shown that the decision is not in conflict with *Henry, Rec.* v. *Claffey*, 189 Ind. 609. The only distinction he attempts to make is that in *Henry, Rec.* v. *Claffey* an answer set up the discharge, while there was no such answer in the present case. As was said by this court in *Reynolds* v. *Stockton*, 140 U. S. 254, that is no distinction at all; if the representative power is gone, it is immaterial whether the Court was informed of the fact by answer or otherwise. Where a judgment is taken against a receiver after the appointing Court has given up the custody of the property and the receiver has been unconditionally discharged, the situation is not unlike that where a judgment is taken against a defendant who dies pending the action; the judgment is void.

This is the only distinction attempted by the respondent, and the decision of the Circuit Court of Appeals makes none whatever; it does not even refer to this controlling decision of the Supreme Court of Indiana; the common law

of Indiana, determining the law with respect to the validity of judgments against discharged receivers has been declared by the Supreme Court of that State in *Henry, Rec.* v. *Claffey,* 189 Ind. 609, and the principles of law therein declared have not been impaired by any subsequent decision of that court. As was said by this Court in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, federal courts do not have the power to use their judgment as to what the rules of the common law are.

> "Law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in the State, whether called common law or not, is not the common law generally, but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else, * * * the authority and only the authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word."

The decision and opinion of the Circuit Court of Appeals ignores the local law as declared in *Henry, Rec.* v. *Claffey,* and rendered a decision not only in conflict with it, but with the general common law of the land.

The respondent wholly avoids the question in his point that the Courts of Appeal of Indiana had reviewed the alleged errors in the negligence case. That a judgment against a receiver after his unconditional discharge, and after all funds in his hands have been distributed, under the order of the Court, is void, was not before the Court in the appeal of said negligence case.

If the judgment rendered by the State Court was void when rendered, as it was, it did not become valid by the acts of the receiver appealing the same. The judgment was not voidable, it was void, and can be collaterally attacked.

The Circuit Court of Appeals, without holding that

there is any principle of estoppel applicable, seems to hold that this void judgment became valid because no answer setting up the discharge was filed and because the purchaser paid part of the costs of appealing the negligence case. The opinion says that in this action wherein the receiver was the only defendant that it was his duty to appear and defend "and in so doing he was the proper spokesman for, and protector of, the defendant." Who is meant by the "defendant" is not clear, but presumably it means "the purchaser". Then the court criticises the receiver for appealing the cause, and in not informing the respondent of facts disclosed by public judicial records. The receiver was not obliged to inform respondent of the contents of public records to which he had free access, and upon which he must rely for the acquirement of any rights against the receivership. There is no contention that there was the concealment of any fact not contained in a public record.

When the negligence trial was begun October 30, 1930, all the property had been turned over to the purchaser under order of the Court since February 11, 1930 (R. 110). This order by its terms required the making of the purchaser a party if the plaintiff desired to reach property in its hands (R. 104). It did not, as the Circuit Court of Appeals states, make the receiver the "spokesman and protector" of the purchaser.

When the judgment was entered December 22, 1930, the receiver had been discharged by a judicial and public order 53 days, and the receiver had been divested of all property by an order of the Court for more than ten months.

In the appeal there was no stay or supersedeas bond filed (R. 125); respondent was entirely free to enforce his alleged judgment, or to bring any new proceeding based upon the orders of the District Court. He was at

all times possessed of the remedy to request the setting aside of the order of discharge, and the allowance of his claim by the receivership court as the order permitted (R. 104). Respondent did none of these things.

While the foreclosure decree stated that negligence claims not then reduced to judgment should be valid "to the same extent as though any judgment thereon had been recovered prior to the sale", it also required such judgments to be proved in the receivership court (R. 104(h)).

Respondent was not misled in any way by petitioners or any of them and no claim could possibly be made that petitioner Girard Trust Company acted in any way in the matter. Respondent's position is entirely due to his indifference to the rights given him and the obligations imposed upon him both by these public records and by the plain principles of law contained in the case of *Henry, Rec.* v. *Claffey.*

Point IV.

The Supreme Court of Indiana in the case of *Henry, Rec.* v. *Claffey,* 189 Ind. 609, clearly stated the local law of Indiana that in such a case as the present, in order to reach the property sold at a receiver's sale, and impress a charge upon it, "the purchaser and those in the possession of the railroad after the sale—whose interests would be affected by the decree establishing a claim against the property—must have notice of such claim and the presentation of it to the Court."

In an entirely parallel case the Eighth Circuit Court of Appeals in *Shepherd* v. *St. Louis Pub. Ser. Co.,* 64 Fed. (2d) 612 said:

> "From the above, it is clear that no provision in the contract of purchase can be construed as authorizing or permitting the establishment of claims, the payment of which was assumed by the purchaser, to be anywhere except in the court conducting the re-

> ceivership. The appellant is not asking that court to establish the validity and amount of his claim, but is asking the court to accept the judgment of the state court as an establishment of the claim and to enforce it. In so doing, he has not brought himself within the terms upon which the purchaser assumed responsibility. Therefore, even if the judgment in the state court were entirely valid, it could be the basis of no enforceable obligation against the purchaser under the reservation of jurisdiction in the federal court."

Respondent's duty to make the purchaser a party arose on the day the sale was approved, to-wit, February 11, 1930; he attempts no explanation of his failure to do what both the terms of the decree and well established principles of equity required. His only answer is that this was in issue in the negligence case.

It was not in issue at any time in the negligence case; respondent obtained his rights, if any, against the property sold at the receiver's sale only through the foreclosure decree, and it was his duty to pursue those rights under that decree; it was not the duty of petitioners to pursue them for him.

We find nothing in respondent's Brief under this point suggesting any modification of the rule in *Henry, Rec.* v. *Claffey,* 189 Ind. 609 by any subsequent decision of the Supreme Court of Indiana. In the case of *State, ex. rel. Elder* v. *Circuit Court,* 212 Ind. 1, there was a plain reservation of jurisdiction and there was no unconditional discharge of the receiver.

Point V.

The receivership of the Chicago, South Bend & Northern Indiana Railway Company was terminated in the District Court by an unconditional discharge on October 30, 1930 (R. 111). The purchaser at the receiver's sale had the actual and legal possession of all said property from that date to December 28, 1931 when in an equity receivership the St. Joseph Circuit Court, a State Court, took the actual and legal possession of the same (R. 112). The District Court has never since said discharge asserted any power or jurisdiction over said property and was never asked to until respondent filed this proceedings February 14, 1936 (R. 127); and the District Court refused to take jurisdiction of this case wholly for the reason that it had lost jurisdiction, and to retake it would be an unjustified interference with the State Court which had carried on administration of the trust since December 28, 1931 (R. 124).

The unconditional discharge of the receiver on October 30, 1930 was the final judgment in the receivership cause; no matter what reservations there may have been in any interlocutory or intermediate orders, it was the unconditional discharge of the receiver which terminated both the actual and constructive custody and possession of the property by the District Court, and ended the official existence of the receiver. Since jurisdiction over the property after the discharge was not reserved by the District Court, the State Court had exclusive control thereof. The Resolute, 168 U. S. 437.

The respondent at pages 15-16 of his Brief argues that jurisdiction was reserved in the very face of the opinion of the Circuit Court of Appeals that it was not (R. 151).

We have restated the facts only to urge again the apparent and unseemly conflict of jurisdictions created by the

decision; it is inherent and obvious in these words of the judgment:

> "that plaintiff may proceed to enforce his judgment in the United States District Court if consent be granted, by the Indiana State Circuit Court, and in case such consent is not given, said plaintiff may proceed and is authorized to proceed in said state court as fully as he could in this court to enforce his said judgment lien against the property of the Northern Indiana Railway, Inc. and for any other rights which he may have by virtue of his judgment as determined and established by this court as well as the lien which was created by said judgment and the judgment of this court by this decree; and for any other relief *consistent with the views expressed in the opinion of this court.*" (Italics ours.)

We have found no case, not even those where the unauthorized assumption of jurisdiction is condemned, wherein the seeds of unseemly strife between courts were so patently present as in this decision. Deference to the possession and powers of the State Court was recognized by the District Court, and it was likewise a judicial duty of the highest order of the Circuit Court of Appeals to recognize it.

It was the exclusive duty and power of the State Court (a) to examine the proceedings had in the former receivership and in the negligence case and determine whether respondent had a valid judgment, (b) whether it imposed a lien, (c) whether it had priority over other claims and the mortgage of petitioner Girard Trust Company, Trustee, (d) whether respondent had filed his claim in time, and (e) if he was entitled to relief, what it should be.

The State Court had a right to make its determination consistent with its views, not "consistent with the views expressed in the opinion of this court," *i. e.*, the Circuit Court of Appeals.

The question here presented is of the highest importance; if this decision of the Seventh Circuit stands as the law

governing similar cases then there will be a complete destruction of those rules which have heretofore preserved the proper courtesy and respect of federal courts towards state courts.

Point VI.

Respondent has wholly failed to discuss the question presented under this Point, which is "Did plaintiff have a lien?" Instead he assumes that the only thing done by the decision of the Circuit Court of Appeals was the "recognition of a prior determination of the existence and amount of indebtedness of the defendant to creditors seeking to participate," and that since such a judgment would not deal directly with property, it would not offend as against this court's decision in *Reihl* v. *Margolies*, 279 U. S. 218. But the decision here not only defined the amount of the debt, it (a) declared a lien for its protection, (b) gave it priority over mortgages, (c) requires the State Court to give recognition to the debt and lien even though respondent has not met the requirements of that court as to the presentation of claims.

Reihl v. *Margolies* says that the State Court having taken into its possession all the property of the railway in an equity receivership had the right "to decide all questions incident to the preservation, collection and distribution of the assets." That right is entirely destroyed by the decision of the Circuit Court of Appeals.

Point VII.

Respondent admits that petitioner Girard Trust Company, Trustee, was not a party either to the negligence case or to the receivership case, but urges that the question is moot because the Girard Trust Company, Trustee "has agreed to a plan of reorganization," and cites an Appendix at page 21 of his Brief, which he has most improperly attempted to make a part of the record. Even if the affidavit shown in said Appendix were a proper part of the record, we inquire wherein does it appear that Girard Trust Company "agreed" to it, or was in any way a party to it, or that said petitioner had anything to do with the formulation of the Plan.

Respondent next says, even if it was not a party, nevertheless the "Girard Trust Company's lien is inferior to plaintiff's."

The question is whether this petitioner was accorded due process of law under the Fifth Amendment of the Constitution of the United States; it is not whether a prior lien in respondent's favor would have been declared valid if said petitioner had been made a party. If this petitioner had been accorded due process it would have had an opportunity of presenting all the evidence, not part as the respondent attempted to do *ex parte;* the case of *McCullough* v. *Union Traction Company,* 206 Ind. 585, depended upon its own facts, and this court cannot assume that that case would be similar and controlling upon facts elicited in a hearing given the petitioner; the decision in the McCullough case is based on the Public Service Commission law, here the petitioner's mortgage lien came into existence in 1900, thirteen years before the enactment of the Public Service Commission law of Indiana.

We know of no rule of law or morals which holds that

without a hearing one man's property can be taken and given to another, upon the assumption that if he had been given a hearing, he would still have lost it.

It seems unnecessary again to emphasize the offense given by this decision against those great constitutional safeguards which are fundamental in our judicial system.

We again urge the importance of the questions submitted by the petition, and pray that a writ of certiorari be granted.

Respectfully submitted,

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